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Supreme Court, U.S.
FILED
MAY 23 2003
OFFICE OF THE CLERK

No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE COMMUNICATIONS WORKERS OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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60

27pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
CONCLUSION	23

TABLE OF AUTHORITIES

CASES — Page

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 11

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) ..... *passim*

Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) 6

Associated Press v. United States, 326 U.S. 1 (1945) 21-23

Express Cases, 117 U.S. 1 (1886) 2, 6-7, 10, 11

Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) 14

Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) 2, 5, 6, 21-22

Home Telephone Co. v. Granby & Neosho Telephone Co., 126 S.W. 773 (Mo. App. 1910) 7

Jencks v. Coleman, 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,258) 6, 7

Olympia Equip. Leasing v. Western Union Tel., 797 F.2d 370 (7th Cir. 1986) 11, 14

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) ..... *passim*

People ex rel. Oneida Telephone Co. v. Central New York Telephone & Telegraph Co., 41 A.D. 17 (N.Y. App. 1899) 7

People ex rel. Postal Telegraph Cable Co. v. Hudson River Tel. Co., 1887 WL 2590 (N.Y. Sup. 1887) 15, 16

State Oil Co. v. Kahn, 522 U.S. 3 (1997) 15

United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912) 21-23

Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002) 11

TABLE OF AUTHORITIES—Continued

STATUTES — Page

Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56 ..... *passim*

15 U.S.C. § 2 ..... *passim*

CONGRESSIONAL MATERIALS

Communications Law Reform: Hearings on H.R. 1555 Before the Subcomm. on Telecomms. and Finance, House Commerce Comm., 104th Cong. (1995) 9

Communications Act of 1994: Hearings on S. 1822 Before the Subcomm. on Antitrust, Monopolies, & Business Rights, Senate Judiciary Comm., 103rd Cong. (1994) 9

Hearings on S. 1822 Before the Senate Commerce, Science, & Transp. Comm., 103rd Cong. (1994) 9

Hearings on H.R. *3626 Before the Subcomm. on Telecomms. and Finance, House Energy and Commerce Comm.*, 104th Cong. (1994) 9-10

Telecomms. Infrastructure Act of 1993: Hearings on S. 1086 Before the Subcomm. on Communication, Senate Commerce, Science, & Transp. Comm., 103rd Cong. (1993) 9-10

MISCELLANEOUS

IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* (2d ed. 2002) 6, 21-23

S. Breyer, *Regulation and Its Reform* (1982) 7, 8, 9, 17

BRIEF FOR THE COMMUNICATIONS WORKERS OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

This brief *amicus curiae* is filed by the Communications Workers of America with the written consent of the parties, as provided in the Rules of this Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The Communications Workers of America (CWA) is a labor organization which represents more than 730,000 members in communications, information services, media, broadcast and publishing, higher education, health care and public service, the airline industry and manufacturing. Over 500,000 of CWA's members work for wireline, cable and wireless companies serving all segments of the communications industry.

The experience under the Telecommunications Act of 1996 raises a critical concern about legal rules that require incumbent local telephone companies to make portions of their operational facilities available to aspiring competitors to enable the latter to provide the same communications services to the same class of customers: *viz*. that such rules serve to discourage capital investment in creating, improving and maintaining telecommunications networks—both by the incumbents and by their aspiring competitors. Such a reduction in investment in the telecommunications infrastructure results in an accompanying reduction both of employment opportunities for the thousands of telecommunications workers who manufacture network components and who construct and maintain such networks and of the telecommunications

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[1] Counsel for a party has not authored this brief in whole or in part. No person or entity other than the *amicus curiae*, their members, or their counsel, has made a monetary contribution to the preparation or filing of this brief.

industry's capacity to provide customers with the most reliable and advanced telecommunications services.

Because of this concern CWA has participated in the proceedings before the Federal Communications Commission on the implementation of the Telecommunications Act's operational-facility-sharing rules. And it is because of this concern that CWA seeks to address the claim in this case that the antitrust laws impose a second separate and independent duty—enforceable through treble damages jury litigation—on incumbent local telephone companies to make portions of their operational facilities available to aspiring competitor communications companies. Indeed, CWA has a particularly strong interest in this case because a ruling that the antitrust laws create such a duty would most certainly act as a heightened deterrent to new job-creating capacity-enhancing capital investment in the telecommunications infrastructure.

SUMMARY OF ARGUMENT

Plaintiff-Respondent Trinko claims that the antitrust laws impose a duty on a business firm which operates in a government-regulated "natural monopoly" market to make a portion of its operational facilities available to third-party business firms on just, fair and reasonable terms to enable those other firms to act as competitors in that market providing the same services to the same class of customers. The court in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) rejected an identical claim, and rightly so.

1. *Goldwasser*'s holding that the antitrust laws do not impose such a duty is firmly rooted in the restraint-of-trade common law that forms the background for the Sherman Act. As exemplified by this Court's decision in the *Express Cases*, 117 U.S. 1 (1886), at common law a monopolist public utility did *not* have a duty to share a portion of its operational facilities with other firms to enable them to act as competitors in the natural monopoly market providing the same services to the same class of customers.

Goldwasser's holding that the antitrust laws do not impose such a duty likewise is firmly rooted in the most basic antitrust law principles and policies. The office of the antitrust laws is to police workably competitive markets—*i.e.*, markets that by their nature are conducive to business competition in the absence of certain forms of private conduct tending to prevent or inhibit such competition. Conversely, natural monopoly markets—*i.e.*, markets that it is claimed cannot efficiently support more than one firm—have always functioned under, and been structured by, a "classical regulation" regime and not an antitrust regime.

That being so, the question whether a monopolist public utility operating in a government-regulated natural monopoly market should be compelled to share its operational facilities with aspiring competitors in that market—and, if so, on what terms—is *not* an antitrust question to be answered through the judicial process, but a "classical regulation" question to be answered through such regulation's more finely-tuned legislative/quasi-legislative processes. Quite appropriately, then, this question *has been answered* for the monopolist public utilities operating in government-regulated local telephone services markets across the country in the Telecommunications Act of 1996 and in the numerous and complex administrative regulations implementing the Telecommunications Act's proscriptions.

2. This Court's sharply-divided 4-3 decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) is not, as the court below suggested, to the contrary. Taken on its own terms, *Otter Tail* holds that it can be a Sherman Act § 2 violation for a monopolist public utility operating in a government-regulated natural monopoly market to refuse to share a facility with or otherwise cooperate with a third party where that refusal impairs competition *in an adjacent workably competitive market*. Thus, while the defendant in *Otter Tail* was, as here, a monopolist public utility, the point

of that Sherman Act case was *not* to displace "classical regulation" as the means of structuring the utility's natural monopoly market, but rather to further the core antitrust law purpose of policing an adjacent workably competitive market.

For this reason, whether *Otter Tail* is correct on its own terms need not be decided here. But *Otter Tail* may merit reconsideration in an appropriate case, inasmuch as it rests on the dubious premise that the courts through antitrust litigation are equipped to regulate certain discrete aspects of the conduct of a monopolist public utility operating in a government-regulated natural monopoly market (*viz.*, conduct affecting competition in adjacent workably competitive markets) without undermining the duly-considered and duly-authorized policy decisions of the regulators exercising primary jurisdiction over the public utility industry as a whole.

3. The court below was even further afield in suggesting that *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) supports Trinko's antitrust claim. The *Aspen Skiing* Court rejected as inapposite the defendant Ski Co.'s reliance on the general "no [antitrust law] duty to cooperate with business rivals" rule that governs where the refusal to cooperate is by a monopolist public utility operating in a government-regulated natural monopoly market for the following reason: Ski Co. was operating *in a workably competitive market* in which its competitor Highlands also operated, and it was therefore appropriate to evaluate, under Sherman Act § 2, Ski Co.'s actions toward Highlands that enabled Ski Co. to dominate that market to determine whether those actions were improperly anticompetitive or exclusionary. Thus, far from supporting Trinko's antitrust claim, *Aspen Skiing* underscores the point that we submit is fatal to that claim—*viz.*, that the office of the antitrust laws is to police workably competitive markets, and not to restructure government-regulated natural monopoly markets.

ARGUMENT

I.

Plaintiff-Respondent Trinko's claim in this case is that the antitrust laws impose a duty on a business firm which operates in a government-regulated "natural monopoly" market—here Defendant-Petitioner Verizon, a firm which provides local telephone services to a class of customers—to make a portion of its operational facilities available to third-party business firms on just, fair and reasonable terms to enable those other firms to act as competitors in that market providing the same services to the same class of customers.[2]

In *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the Seventh Circuit—in an opinion by Judge Diane Wood, an antitrust law professor and former Justice Department Antitrust Division official—upheld the Rule 12(b)(6) dismissal of a Sherman Act § 2 complaint making the same claim Trinko makes here:

> A complaint like this one, which takes the form "X is a monopolist; X didn't help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high" does *not* state a claim under [Sherman Act] Section 2. *The*

[2] It perhaps is more accurate to characterize Verizon as a quasi-monopolist in the market for local telephone services. For the Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56, imposes a statutory duty on Verizon to share its facilities with aspiring competitors in that market and by force of this statutory requirement the market itself is in the process of being transformed from a pure natural monopoly market to a hybrid natural monopoly market. But inasmuch as Trinko's complaint proceeds on the premise that Verizon is a monopolist operating in a natural monopoly market in posing the question whether Petitioner has an *antitrust* duty to share its facilities with aspiring competitors *that stands independent of the Telecommunications Act of 1996 and thus would exist even if that landscape-changing Act never had been passed*, we accept Trinko's premise for the limited purpose of addressing that antitrust question.

> *reason is because the antitrust laws do not impose that kind of affirmative duty, even on monopolists.* [*Id.* at 400 (emphasis added).]

In other words, "the kinds of affirmative duties to help one's competitors"—such as the alleged duty on monopolist public utility A at issue in *Goldwasser* and in the instant case to make A's operational facilities available to aspiring competitor B on just, fair and reasonable terms to enable B to provide the same services as A is providing to the same class of customers—"do not exist under the unadorned antitrust laws." *Id.*

Goldwasser's statement of the limits of the antitrust laws—which is firmly rooted in the restraint-of-trade common law that forms the background for the Sherman Act, and in the most basic antitrust law principles and policies—is, we submit, entirely sound and correct.

A. This Court has recognized "that Congress intended the [Sherman] Act to be construed in the light of its common-law background." *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 531 (1983). Accordingly, it is very much to the point that "[a]t common law a public utility had a general duty to deal with paying customers; however, the duty did *not* generally extend to rivals . . . ." IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 787c, at 301 (2d ed. 2002) (emphasis added) (footnote omitted).

The two leading common law authorities on this point are *Jencks v. Coleman*, 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,258) (Story, J.) and this Court's later decision in the *Express Cases*, 117 U.S. 1 (1886). In the *Express Cases*, the Court held that the defendant railroads—which were "able, ready and willing to do the express carrying business over [their] road[s] for [themselves], and for the benefit of [their] own stockholders, and desir[ed] to take the business into [their] own hands," *see* 117 U.S. at 9; *see also id.* at 14—

acted lawfully in refusing on that basis to make their operational facilities available to the plaintiff express companies to enable the latter to conduct express carrying businesses of their own.[3]

Cases recognizing the applicability of this common law rule to local telephone companies operating in government-regulated natural monopoly markets include *People ex rel. Oneida Telephone Co. v. Central New York Telephone & Telegraph Co.*, 41 A.D. 17 (N.Y. App. 1899), where the court stated that "[a]t the common law, one common carrier could not demand as of right that it be permitted to use its rival carrier's property for the benefit of its own business," *id.* at 19; and *Home Telephone Co. v. Granby & Neosho Telephone Co.*, 126 S.W. 773 (Mo. App. 1910), where the court stated that "[i]t is the law, too, without doubt, that common carriers may not be required, on the assertion of a primary duty in the first instance, to turn over or surrender the physical use of their instrumentalities to a rival concern," *id.* at 778.

B. *Goldwasser* and its common law antecedents point up the distinction between the antitrust laws—whose office is to order "workably competitive" markets and the business firms operating in those markets—and "classical regulation"—whose office is to order "natural monopoly" markets and the monopolist public utility companies operating in the latter.

The antitrust laws "[p]olice[ ] . . . 'workably competitive' markets"—*i.e.*, markets that by their nature are conducive to business competition in the absence of "certain forms of

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[3] In *Jencks*, Justice Story, sitting on circuit, held that a steamship company which had contracted with a stage coach company (the Citizens' line) to pick up its passengers at the dock and transport them to their final destination had no duty to act in a manner "incompatible with [its] interests" by taking on board its ship an employee of a rival stage coach company (the Tremont line) "avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors." 13 F. Cas. at 444.

private conduct" tending to "prevent or inhibit [such] competition." S. Breyer, *Regulation and Its Reform* 156-57 (1982). And, given the nature of those markets, the antitrust laws

> act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct [tending to prevent or inhibit competition]. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do. They are enforced through adjudicatory proceedings in court (or before the Federal Trade Commission). Only rarely do the antitrust enforcement agencies create the detailed web of affirmative legal obligations that characterizes classical regulation. [*Id.* at 157 (emphasis in original).] [4]

Professor Breyer (as he then was) summed up the pertinent point for present purposes as follows: "For these reasons, antitrust is more accurately contrasted with, rather than viewed as another form of, governmental regulation." *Regulation and its Reform*, at 157.

"Natural monopoly" markets—*i.e.*, markets that "it is claimed, cannot efficiently support more than one firm," *Regulation and its Reform*, at 15—are not structured like, do not function like, and are not expected to function like workably competitive markets. And, given their nature, natural monopoly markets—which are not suited to being ordered through antitrust laws attuned to ordering workably competitive markets—have functioned under a "classical regulation" regime and not an antitrust regime. Natural monopoly markets are, in other words, structured by the

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[4] The Sherman Act § 2 provision here at issue is a case in point, providing in the most general, prohibitory terms that

> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony .... [15 U.S.C. § 2.]

imposition of the kind of "detailed web of affirmative legal obligations" on the monopolist public utility that is foreign to the antitrust laws. *Id.* at 15, 157.

It follows that the question whether a monopolist public utility operating in a government-regulated natural monopoly market should be compelled to share its operational facilities with aspiring competitors in that market—and, if so, on what terms—is *not* an antitrust question to be answered through the judicial process, but a classical regulation question to be answered through such regulation's more finely-tuned legislative/quasi-legislative processes.

As a threshold matter, answering this question requires the making of the delicate policy judgment that competition achieved through legally mandated and supervised aspiring competitor access to a monopolist public utility's operational facilities is preferable to the traditional method of curbing a monopolist public utility's market power—*viz.*, "governmental regulation of [its] prices and profits." *Regulation and its Reform*, at 15. That delicate policy judgment is *not* one that Congress made long ago in enacting the Sherman Act, as we have seen. To the contrary, it is one that must ultimately depend on a "detailed analysis" of, and a serious debate over, the costs and benefits of providing for this kind of government compelled "competitive solution[ ]" to the problems posed by a particular natural monopoly market. *Id.* at 314.[5]

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[5] Such a detailed analysis and serious debate did in fact take place over the course of several years prior to the enactment of the Telecommunications Act of 1996. *See, e.g., Communications Law Reform: Hearings on H.R. 1555 Before the Subcomm. on Telecomms. and Finance, House Commerce Comm.*, 104th Cong. 21-48, 88-92, 149-151 (1995); *Communications Act of 1994: Hearings on S. 1822 Before the Subcomm. on Antitrust, Monopolies, & Business Rights, Senate Judiciary Comm.*, 103rd Cong. 6-15 (1994); *Hearings on S. 1822 Before the Senate Commerce, Science, & Transp. Comm.*, 103rd Cong. 10-19, 407-417, 443-449, 543-549, 576-584 (1994); *Hearings on H.R. 3626 Before the*

Beyond that threshold policy judgment lies the equally difficult matter of establishing and enforcing the terms on which the legally mandated sharing of the monopolist public utility's operational facilities with aspiring competitors is to be afforded. In the *Express Cases*, *supra*, this Court—in rejecting the proposition that the defendant railroads had an affirmative common law duty to share their operational facilities with express company competitors—made much of the quintessential classical regulation by the courts the opposite conclusion would entail:

> Having found that the railroad company should furnish the express company with facilities for business, [the lower court] had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities, and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities, or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. [117 U.S. at 28-29.]

All that being so, the Court concluded:

> In this way, as it seems to us, "the [lower] court has made an arrangement for the business intercourse of

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Subcomm. on Telecomms. & Finance, House Energy & Commerce Comm., 104th Cong. 383-392 (1994); *Telecomms. Infrastructure Act of 1993: Hearings on S. 1086 Before the Subcomm. on Communication, Senate Commerce, Science, & Transp. Comm.*, 103rd Cong. 72-74 (1993).

> these companies such as, in its opinion, they ought to have made for themselves," and that, we [previously have] said . . ., could not be done. The regulation of matters of this kind is legislative in character, not judicial. [*Id.* at 29 (internal citations omitted).]

The Sherman Act, which takes its lead from the restraint-of-trade common law, likewise affords no basis upon which a court legitimately could undertake "[t]he regulation of matters of this kind." Rather, once the policy decision has been made by Congress to provide for a particular kind of competition forcing solution to the problems posed by a particular natural monopoly market, the necessary and proper course is for Congress—and/or other bodies acting pursuant to, and within the bounds of, delegated congressional authority—to flesh out the details for effectuating that decision. With respect to the local telephone services markets across the country, the Telecommunications Act of 1996 and its implementing regulations do indeed flesh out those details—which, as is only to be expected, are numerous and complex. *See generally Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

Judge Posner, in his pithy way, summed up the matter as follows:

> [I]t is clear that a firm with lawful monopoly power has no general duty to help its competitors . . . . There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter. So if a firm went to a monopolist and said, "Please—for the sake of competition—give me a loan so I can compete with you and make this a competitive market," and it was turned down, it could not invoke the Sherman Act. [*Olympia Equip. Leasing v. Western Union Tel.*, 797 F.2d 370, 375-76 (7th Cir. 1986) (internal quotations and citations omitted).]

So too if that aspiring competitor went to a monopolist public utility and said, "Please—for the sake of competition—share your operational facilities with me for fair recompense so I can compete with you by providing the same service you provide to the same class of customers and make this a competitive market," and it was turned down, it could not invoke the Sherman Act.

II.

To be sure, workably competitive markets and government-regulated natural monopoly markets are not watertight compartments. As a consequence there are a number of lower court cases treating with the question of the antitrust duty *vel non* of a monopolist operating in a government-regulated natural monopoly market to share a facility with or otherwise cooperate with a third party in circumstances where the imposition of the duty is in the interest of *protecting competition in an adjacent workably competitive market* rather than in the interest of *restructuring the natural monopoly market*. The one such case to reach this Court—and the case mistakenly relied upon by the court below, *see* Pet. App. at 34a-36a—is *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

A. The pertinent facts in *Otter Tail* were these: Otter Tail Power Co. ("Otter Tail") was a full-service electrical utility company that generated, transmitted/"wheeled" and sold electrical power under various arrangements within the States of Minnesota, North Dakota and South Dakota. 410 U.S. at 368. Otter Tail owned the only transmission line capable of "wheeling" electrical power to the town of Elbow Lake, Minnesota, *id.* at 370, and on that account wielded substantial "monopoly power" vis-à-vis Elbow Lake, *id.* at 377. For many years, Elbow Lake granted Otter Tail a franchise to sell Otter-Tail-generated and Otter-Tail-"wheeled" electrical power to Elbow Lake citizens at retail. *Id.* at 370-71. Desirous of terminating Otter Tail's retail

franchise and establishing its own municipal power system, Elbow Lake constructed its own generating plant and asked the Bureau of Reclamation and various cooperatives to sell it additional power at wholesale. *Id.* at 371. The Bureau and the cooperatives were willing to sell power to Elbow Lake at wholesale "if Otter Tail would wheel it," "[b]ut Otter Tail refused, relying on provisions in its contracts [with the Bureau and the cooperatives] which barred the use of [Otter Tail's] lines for wheeling power to towns which [Otter Tail] had served at retail." *Id.* The United States sued, complaining that this refusal to deal by Otter Tail violated Sherman Act § 2.[6]

In a sharply-divided 4-3 opinion, this Court affirmed a § 2 judgment against Otter Tail. The bulk of Justice Douglas' opinion for the Court was devoted to rejecting Otter Tail's inter-related arguments that (i) its refusal to deal was immune from antitrust scrutiny by virtue of certain provisions in the Federal Power Act; and (ii) the District Court decree enjoining Otter Tail against refusing to deal impinged upon the Federal Power Commission's authority under the Power Act. *See id.* at 372-77. That opinion was on the other hand so terse in elaborating its Sherman Act § 2 violation theory as to be obscure. *See id.* at 377-79. But Judge Easterbook—yet

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[6] Two other towns (Colman and Aurora, South Dakota) on whose behalf the United States sued "had access to other transmission" in developing their own municipal power systems—leading Otter Tail to "use[ ] the weapon of litigation" against them as a means of squelching that development. 410 U.S. at 371. That litigation conduct on Otter Tail's part raised an entirely separate issue of "*Noerr-Pennington*" antitrust immunity that is irrelevant here. *See id.* at 379-80. A third town (Hankinson, North Dakota) was similarly-situated to Elbow Lake in that it did not have "access to other transmission," but unlike Elbow Lake it acceded to Otter Tail's pressure tactics and renewed Otter Tail's franchise. *See id.* at 371-72. Accordingly, we limit our discussion in text to the dispute between Otter Tail and Elbow Lake.

another of the Seventh Circuit judges with considerable antitrust credentials, *compare supra* pp. 5 & 11—has provided a most cogent gloss:

> [In *Otter Tail*,] [t]here were *three* markets: the market in generation of power, the market in transmission, and the market in retail distribution (like manufacturing, wholesaling, and retailing). Otter Tail held a monopoly of transmission (wholesaling). ***But generation of power is highly competitive***, and many generating firms put their power on the nationwide grid of transmission lines owned by the many electrical utilities. Elbow Lake wanted to shop among the generating firms for the best price. Elbow Lake also may have been hoping that it could distribute power at retail for less than Otter Tail's costs. Otter Tail's refusal to wheel power prevented Elbow Lake from shopping, and thereby had the potential to raise the prices to Elbow Lake's consumers. . . . Otter Tail's transmission prices were regulated; to make a monopoly profit it needed to seize control of an unregulated market, which it did. ***Otter Tail used its bottleneck to prevent Elbow Lake from receiving the benefit of ongoing competition at the generating level.*** [*Fishman v. Estate of Wirtz*, 807 F.2d 520, 571 (7th Cir. 1986) (Easterbrook, J., dissenting) (emphasis added).]

All this being so,

> in *Olympia*, [*supra*,] 797 F.2d at 376-77, in summarizing the point of the essential facility cases [and *Otter Tail* in particular], we said it would be a violation for Western Union to cut off telex service to customers that buy from rival vendors of equipment: ***the equipment market is competitive, unless a firm uses its bottleneck to stamp out that competition.*** [*Id.* at 571.]

Otter Tail thus lends no support whatsoever to Trinko's antitrust claim here. Taken on its own terms, *Otter Tail* holds that it can be a Sherman Act § 2 violation for a monopolist public utility operating in a government-regulated natural monopoly market to refuse to share a facility with or otherwise cooperate with a third party where that refusal impairs competition *in an adjacent workably competitive market*. Thus, while the defendant in *Otter Tail* was, as here, a monopolist public utility, the point of that Sherman Act case was *not* to displace "classical regulation" as the means of policing the utility's natural monopoly market (power transmission), but rather to further the core antitrust law purpose of policing an adjacent workably competitive market (power generation).

In the instant case, Trinko is not invoking the Sherman Act to require Verizon to share its local exchange facilities with AT&T on just, fair and reasonable terms for the purpose of allowing AT&T to compete against Verizon in an adjacent workably competitive market (such as, for example, the telephone equipment market or the long distance market). Rather, Trinko invokes the Sherman Act to require Verizon to share its local exchange facilities with AT&T on just, fair and reasonable terms for the purpose of *restructuring Verizon's government-regulated, natural monopoly local telephone services market*. Policing such a natural monopoly market as such by restructuring it has never been a point or purpose of the antitrust laws, as we have stressed. And nothing in *Otter Tail* states or even fairly suggests otherwise.

B. Although the foregoing is dispositive insofar as the court below's reliance on *Otter Tail* is concerned, we would be remiss if we did not add that *Otter Tail* may merit "reconsider[ation]" in an appropriate case inasmuch as its "theoretical underpinnings" are open to "serious question." *Compare State Oil Co. v. Kahn*, 522 U.S. 3, 21 (1997).

On the one hand, there arguably is a restraint-of-trade common law predicate for the Sherman Act result reached in *Otter Tail*. In *People ex rel. Postal Telegraph Cable Co. v. Hudson River Tel. Co.*, 1887 WL 2590 (N.Y. Sup. 1887), for example, the court invalidated the policy of the defendant local telephone company—which, among other things, oper-

ated a messenger service business—of not allowing "the use of [one of its] telephone[s] by a subscriber for the purpose of calling messengers except from the Central office," *id.* *8, stating:

> The defendant [telephone company] urges that the messenger business as conducted by it is profitable, and for that reason it is desirable that it should be retained as free from [third person] competition as possible; and in aid of its position invokes the rule as established by the courts, that it owes no such duty to its rival as the permission to use its property for the purpose of a competing business, would constitute. The rule cannot be questioned, but the application is faulty. The messenger business, although carried on by the same company and at the same offices, is nevertheless a distinct and separate business, and in no wise essential to the conduct of the defendant's system of transmitting messages by telephone, for which purpose it was incorporated. To extend the rule protecting its business from rivals, so as to include any other business in which it might see fit to engage, could result in great injustice to the public. A livery stable, provision store, meat market, and other classes of business could be added in the course of time, and by amending their rules so as to include each new business in the same manner as the messenger service is now attempted to be protected, a monopoly could be created at the expense of tradesmen and merchants, and to the detriment of the public generally. [*Id.*]

On the other hand, *Otter Tail*'s necessary premise is that the courts through antitrust litigation are equipped to regulate certain discrete aspects of the conduct of a monopolist public utility operating in a government-regulated natural monopoly market (*viz.*, conduct affecting competition in adjacent workably competitive markets) without undermining the duly-considered and duly-authorized policy decisions of the regulators exercising primary jurisdiction over the public

utility industry as a whole—and that premise may well be wrong in certain settings at the very least. As Justice Stewart argued in his *Otter Tail* dissent:

> The Court in this case has followed the District Court into a misapplication of the Sherman Act to a highly regulated, natural-monopoly industry wholly different from those that have given rise to ordinary antitrust principles.
>
> . . . .
>
> With respect to decisions by regulated electric utilities as to whether or not to provide nonretail services, I think that in the absence of horizontal conspiracy, the teaching of the "primary jurisdiction" cases argues for leaving governmental regulation to the [Federal Power] Commission instead of the invariably less sensitive and less specifically expert process of antitrust litigation. . . . This is an area where "sporadic action by federal courts" *can* "work mischief." *Cf. United States v. Radio Corp. of America*, 358 U.S. [334], at 350 [(1959)]. [410 U.S. at 382, 391-92 (Stewart, J., dissenting) (emphasis in original).]

See also Regulation and its Reform, at 285 & 314 ("The extent to which new competition should be allowed in longline telecommunications" markets inextricably linked to "natural monopoly" local telephone services markets "is essentially a *regulatory* problem" rather than an antitrust problem, and "[t]hose who argue automatically for competitive solutions [in this context] may be wrong.") (emphasis in original).

The Court need not enter this thicket here, however, inasmuch as Trinko's sole claim in this case is that Verizon has an antitrust duty to share its local exchange facilities with AT&T to enable AT&T to compete against Verizon *in a government-regulated natural monopoly local telephone services market*. As we have shown, there is no predicate for

recognizing such an antitrust duty in the restraint-of-trade common law that forms the background for the antitrust laws or in the principles or policies of the antitrust laws. And, the policy judgment whether to impose such a duty (and, if so, on what terms) is properly the "classical regulation" domain of Congress and of the Federal Communications Commission, as Congress' regulatory agent, and not the "antitrust" domain of the federal courts applying general Sherman Act provisions designed to police workably competitive markets. *Supra* pp. 7-12.

III.

The court below also intimated that Trinko's antitrust claim is supported by this Court's post-*Otter Tail* decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). *See* Pet. App. at 28a-29a. But *Aspen Skiing* is even further afield than *Otter Tail*—to the point where it arguably cuts against Trinko's claim.

Aspen Skiing involved "the market for downhill skiing services in Aspen, Colorado" and the ski companies operating in that market. 472 U.S. at 587. The market for downhill skiing services in Aspen is *not* a government-regulated natural monopoly market. Indeed, for a substantial period of time three independent companies operated three separate downhill skiing facilities in the Aspen area in competition with one another and on their own unregulated, freely-established business terms. *Id.* at 589.

The *Aspen Skiing* Court made it plain that the rules which govern the conduct of firms seeking to acquire or maintain monopoly power in an unregulated, workably competitive market are not the same as the rules which govern the conduct of monopoly public utility firms operating in a government-regulated natural monopoly market. As we detail, the *Aspen Skiing* Court rejected as inapposite the defendant Ski Co.'s reliance on the general "no [antitrust law] duty to cooperate with business rivals" rule that governs

where the refusal to cooperate is by a monopolist public utility operating in a government-regulated natural monopoly market for the following reason: Ski Co. was operating *in a workably competitive market* in which its competitor Highlands also operated, and it was therefore appropriate to evaluate, under Sherman Act § 2, Ski Co.'s actions toward Highlands that enabled Ski Co. to dominate that market to determine whether those actions were improperly anticompetitive or exclusionary. Thus, *Aspen Skiing* lends no support whatsoever to Trinko's antitrust claim here.

A. The *Aspen Skiing* case arose out of the following sequence of events. In 1962, the "three [then existing] competitors" in the Aspen downhill skiing services market introduced a 3-area, 6-day lift ticket that allowed purchasers to ski the Aspen facility of their choice during each day of a 6-day Aspen ski vacation, with revenues allocated on the basis of usage. 472 U.S. at 589.

In 1964, Ski Co. bought out one of its competitors, but the two remaining competitors (Ski Co. and Highlands) continued to jointly market the 3-area, 6-day ticket on a revenue-sharing basis and "it sold briskly." *Id.*

In 1967, Ski Co. opened a new facility (its third and the area's fourth), at which point the ticket was converted into a 4-area, 6-day ticket. *Id.* For the next ten years, sales of the 4-area, 6-day ticket boomed. *Id.* at 589-91.

But in 1978, Ski Co. proposed a modification to the joint ticket program that Ski Co. knew Highlands could not accept (Highlands didn't), and "a[s] far as Ski Co. was concerned, the all-Aspen ticket was dead." *Id.* at 593. "In its place Ski Co. offered [a] 3-area, 6-day ticket featuring only its mountains." *Id.* And "Ski Co. took additional actions that made it extremely difficult for Highlands to market its own multiarea package to replace the joint offering." [7] As a result,

[7] These actions included refusing to sell daily life tickets to Highlands although Highlands was willing to pay full retail price for those tickets,

"Highlands' share of the market for downhill skiing services in Aspen declined steadily" from 20.5% in 1976-77 to 11% in 1980-81, and "Highlands' revenues from associated skiing services . . . declined sharply as well." *Id.* at 594-95.

B. Highlands sued Ski Co. under Sherman Act § 2, the gravamen of its § 2 case being that Ski Co. had monopolized the market for downhill skiing services in Aspen by its "refus[al] to cooperate" with Highlands in offering Aspen ski vacationers the opportunity to purchase a lift ticket package allowing them to ski both the Ski Co. and the Highlands facilities. *Id.* at 595, 599. Highlands emerged from the district court and the court of appeals with a § 2 judgment in its favor, *id.* at 598-99, and on certiorari this Court affirmed that § 2 judgment.

In so doing, the Court began by making clear that the common law rule that a monopolist public utility operating in a government-regulated natural monopoly market has no duty to facilitate would-be competitors in that market also applies as a general proposition to a firm that has acquired monopoly power in an unregulated, workably competitive market. *See id.* at 600. The Court concluded, however, that the general rule was not a safe harbor for Ski Co., because *in the latter setting* the right of a monopolist to refuse cooperation with its business rivals is not "unqualified," *id.* at 601, and because

> [i]n the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, *the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.* [*Id.* at 603 (emphasis added).]

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and refusing to accept vouchers issued by Highlands equal to the price of a daily lift ticket at a Ski Co. mountain although the vouchers were guaranteed by funds on deposit in an Aspen bank and were redeemed by Aspen merchants at full value. 472 U.S. at 593-94.

The Court then explained this change and its effects in the following terms:

> The all-Aspen, 6-day ticket with revenues allocated on the basis of usage was first developed when three independent companies operated three different ski mountains in the Aspen area. It continued to provide a desirable option for skiers when the market was enlarged to include four mountains, and when *the character of the market was changed by Ski Co.'s acquisition of monopoly power*. Moreover, since the record discloses that interchangeable tickets are used in other multi-mountain areas *which apparently are competitive*, it seems appropriate to infer that such tickets satisfy consumer demand *in free competitive markets*. [*Id.* at 603 (emphasis added) (citation and footnote omitted).]

Having thus concluded that Ski Co.'s decision "to make an important change in the character of the market," *id.* at 604, precluded Ski Co. from taking safe harbor in the general "no duty to cooperate with business rivals" rule, the Court ruled that whether Ski Co. had violated § 2 depended on whether Ski Co.'s course of conduct taken as a whole could properly be regarded as "anticompetitive" or "exclusionary," *id.* at 604-05. The Court answered that question in the affirmative, *see id.* at 605-11, emphasizing both at the outset and in conclusion that the Court's scope of review was limited given the posture of the case and the normal presumption that juries follow trial court instructions, *see id.* at 604-05, 611.

Given its holding and its rationale, far from supporting Trinko's antitrust claim, *Aspen Skiing* underscores the point that we submit is fatal to that claim—*viz.*, that the office of the antitrust laws is to police workably competitive markets, and not to restructure government-regulated natural monopoly markets.[8]

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[8] The *Goldwasser* plaintiffs invoked *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912) and *Associated Press v. United States*, 326 U.S. 1 (1945) as support for their antitrust claim parallel to

Trinko's here. *See* 227 F.3d at 401. While the court below did not rely on those decisions in finding Trinko's claim actionable, for the sake of completeness we conclude by noting why neither provides Trinko any comfort.

As a threshold matter, both *Terminal Railroad* and *Associated Press* involved concerted business activity and not unilateral business activity, "a fact that clearly limits their application" to the matter at hand. *See* Areeda & Hovenkamp, *Antitrust Law*, *supra*, ¶ 772d, at 192-95.

Moreover, even on their own terms both decisions are entirely consistent with *Otter Tail*'s and *Aspen Skiing*'s teaching that the Sherman Act polices business activity that prevents or inhibits competition *in workably competitive markets*. Thus, in *Terminal Railroad*, the Court held that the combination of three independent terminal railroad companies then offering three competing means of passage of railroad freight across the Mississippi river at St. Louis into a single terminal railroad company offering only one such means of passage violated the Sherman Act because the effect of that combination was "[t]o close the door to competition" for the provision of passage that previously had existed. 224 U.S. at 398; *see also id.* at 392-93 ("Thus, for a time, there existed three independent methods by which connection was maintained between railroads terminating on either side of the river at St. Louis," and although "[t]his resulted in some cases in an unnecessary duplication of facilities, . . . it at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service."). Similarly, in *Associated Press*, the Court held that the concerted refusal of more than 1,200 newspapers who were members of the Associated Press to admit new members who competed or wished to compete with an existing member violated the Sherman Act because competition in the newspaper publishing market was viable and the concerted refusal was aimed at impeding and ultimately destroying such competition. *See* 326 U.S. at 11-14.

We would add that *Terminal Railroad* and *Associated Press* are of one piece with *Otter Tail* and *Aspen Skiing*—and at a distant remove from the instant case—in a second respect as well. In all four cases, the Court was in a position to evaluate the legality of the defendant(s)' conduct and/or frame a remedial decree based on a prior course of voluntary dealing between the defendant(s) and other persons: in *Otter Tail*, the defendant had in the past "wheeled" wholesale power to towns that it did not serve at retail; in *Aspen Skiing*, the defendant had jointly marketed a multi-area lift ticket with the plaintiff for years on an established revenue-sharing

CONCLUSION

For the foregoing reasons, and the additional reasons set out in Verizon's brief, the judgment below should be reversed.

Respectfully submitted,

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basis; and in both *Terminal Railroad* and *Associated Press*, the defendants set the terms on which favored companies were admitted into the combination found to violate the antitrust laws, thus allowing the court to remedy that violation by the simple expedient of "ordering admission [of non-favored companies] on nondiscriminatory terms," *see* Areeda & Hovenkamp, *Antitrust Law*, at 194. By definition, no such prior course of voluntary dealing exists in the case of a monopolist public utility that operates through its own facilities and that has not made and does not wish to make time share arrangements for use of its operational facilities with aspiring competitors. Accordingly, imposing on such a monopolist an antitrust duty to provide such competitors with access to its operational facilities would, quite improperly, require the courts to assume the quintessential legislative/quasi-legislative role of establishing the terms of that compelled access. *See supra* pp. 10-11.